



The Comptroller General  
of the United States

Washington, D.C. 20548

## Decision

Matter of: United Telecontrol Electronics, Inc.

File: B-230246; B-230246.2

Date: June 21, 1988

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### DIGEST

Contracting agency improperly made award on the basis of initial proposals to other than the offeror proposing the lowest overall cost where offerors in the competitive range were not permitted to revise initial technical proposals but only to price amendment for increased quantity, and in effect, merely to resubmit new initial proposals, and where no request for best and final offers was made before award.

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### DECISION

United Telecontrol Electronics, Inc. (UTE), protests the award to Allied Corporation, Bendix Communications Division of a production contract to manufacture the AN/APX-100 transponder and associated equipment<sup>1/</sup> under request for proposals (RFP) No. N00019-86-R-0110, issued by the Naval Air Systems Command (NAVAIR) in Arlington, Virginia, for the Navy, the Army and other agencies. UTE essentially complains that the award was improper due to the Navy's failure to conduct technical discussions during the source selection process, thereby denying UTE the opportunity of curing perceived deficiencies in its proposal. We sustain the protest because we find that the award to Allied was made on the basis of initial proposals to other than the technically acceptable offeror proposing the lowest overall cost.

The RFP, issued on April 15, 1987, contemplated the award of a firm, fixed-price contract and called for the production of 815 AN/APX-100 transponders (with options for an additional 3,034 units). The RFP stated that the government would award the contract to the responsible offeror whose offer conforming to the solicitation is the most

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<sup>1/</sup> The AN/APX-100 transponder is a multi-service, multi-platform receiver-transmitter used in military aircraft which identifies approaching aircraft as friend or foe and also provides the same information to other aircraft. This is known as "Identification, Friend or Foe" (IFF) capability. The item is used in 21 different aircraft.

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advantageous to the government, cost or price and other factors considered. Technical and price proposals were to be given equal weight. The offeror's price was stated to be the sum of the prices proposed for the basic and option years. The RFP further stated that "[i]f after technical evaluation and scoring, the ranking of two or more proposals in the competitive range is equal or nearly so, the contract may be awarded to the offeror submitting the lowest price."

Six offerors responded to the RFP. A technical evaluation was conducted and a subsequent report was completed on October 14, scoring first ranked Allied slightly higher technically than second ranked UTE (91.8 versus 86.0 technical points). Both firms were rated as "Excellent" from a technical standpoint. Further, UTE's proposed price was significantly lower than Allied's. The Navy's technical evaluators, in their report, also noted as follows:

"The proposal from Allied is considered fully acceptable and contract award could be made without additional discussions or a site survey. The proposal from UTE and [another firm] have weaknesses that would need to be resolved in discussions."

Since UTE proposed a lower cost and "appeared to be in line for award," a preaward survey was conducted on October 27, which found UTE to be a responsible contractor and recommended full award. However, six NAVAIR personnel, including the chairman of the technical evaluation panel, also took part in the preaward survey on-site visit to UTE's facility. At least two of these individuals, including the chairman, filed dissenting reports and recommended no award to the firm based on their observations. The contracting officer subsequently agreed with the recommendation that award be made to UTE.

However, in late November, NAVAIR was informed that the requirements for the Army and the Aviation Supply Office would be increased and that funding for these additional requirements would be released. (The Army had earlier in October experienced funding problems). Accordingly, amendment No. 0007 was issued on December 4 to increase the basic requirement from 815 units to 1,145 units and the option requirement from 3,034 units to 3,079 units. The amendment stated that "[d]ue to the criticality of the need for this equipment it is required that you furnish a resubmittal of your cost proposal only to NAVAIR no later than 11 December 1987." Four days later, on December 8,

amendment No. 0008 was issued clarifying certain line items, and stating that "[s]hould your technical proposal require revision, due to amendments 0007 and/or 0008 only, it is requested that only those specific effected areas of your technical proposal be addressed." Thus, no revisions to the basic proposals were requested and no discussions had been conducted with any offeror concerning possible technical deficiencies in their basic technical proposals.

Revised proposals were received on December 14. An evaluation of the revised proposals was completed and the technical evaluation panel recommended that the Navy award the contract to Allied as the firm offering the highest total combined score (technical and price). UTE's technical score had been reduced from 86.0 (excellent) to 72.0 (satisfactory), primarily because of the unfavorable observations of the technical evaluators during the preaward survey of UTE. The evaluators also increased Allied's technical score to 92.6. Based on the combination of the cost and technical scores, Allied's proposal was rated at a total combined score (price and technical) of 91.63 points and UTE was evaluated as second best with 88.88 points. (Allied offered a total price significantly higher than the price of UTE). The contracting officer awarded the contract to Allied on February 9, 1988, without having conducted discussions and without having requested best and final offers (BAFOs). This protest followed. The Navy made a determination to continue performance of Allied's contract because any delay would "cause an immediate and serious impact on the readiness" of military forces worldwide.

The matter for resolution simply is whether the Navy properly awarded the contract on the basis of initial proposals as revised to the limited extent permitted by amendment Nos. 0007 and 0008. Under the Competition in Contracting Act of 1984 (CICA), 10 U.S.C. § 2305(b)(4) (A)(ii) (Supp. III 1985), agencies have limited discretion to make award on the basis of initial proposals without discussions. We have recognized an exception to the general requirement that agencies must conduct negotiations in a negotiated procurement in that the requirement need not be met "when it can be clearly demonstrated from the existence of full and open competition or accurate prior cost experience with the product or service that acceptance of the most favorable initial proposal without discussions would result in the lowest overall cost to the government." Pan Am Support Services, Inc.--Request for Reconsideration, B-225964.2, May 14, 1987, 66 Comp. Gen. \_\_\_\_\_, 87-1 CPD ¶ 512. By its express use of the term "lowest overall cost," CICA prohibits an agency from accepting an initial proposal where there is another technically acceptable proposal in the competitive range at a lower cost. Id.

We find that the Navy improperly made award on the basis of initial proposals to other than the technically acceptable offeror in the competitive range proposing a lower cost. Meridian Corp., B-228468, Feb. 3, 1988, 67 Comp. Gen. \_\_\_\_\_, 88-1 CPD ¶ 108. While we recognize that the Navy issued amendments requesting revised proposals, these amendments constituted, in effect, a request for new initial proposals based on the increased quantities. The Navy did not request BAFOs. Further, UTE's proposal represented a lower cost technically acceptable proposal that had a reasonable chance for award.

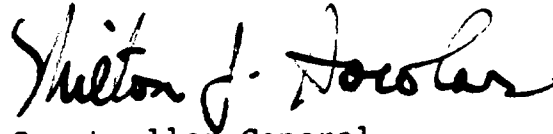
While the agency rated UTE's technical proposal satisfactory and thus, in effect, within the competitive range, the agency argues that UTE's proposal weaknesses are substantive, not informational, and "no amount of discussions could significantly improve the technical score of UTE or any other offeror." We find no merit to this argument. Given the closeness in total overall scoring (Allied with 91.63 points and UTE with 88.88 points), had the agency requested a BAFO, UTE may have lowered its price sufficiently to be in line for award. Moreover, the Navy's position is primarily based on its speculation that deficiencies were "not likely" to be corrected through discussions. However, the record shows substantive technical responses by UTE in its comments on the agency report to all the alleged deficiencies, and the firm was not allowed to explain its technical responses during discussions and by revisions to its proposal. Accordingly, we sustain the protest on this issue.

The appropriate remedy where an agency fails to conduct discussions would ordinarily be for the agency to do so and request BAFOs. That remedy is not practical here since NAVAIR made a determination to continue performance by Allied because the equipment is essential, is in short supply, and late delivery would cause grounding of aircraft. Because of the urgency of the requirement, we will not recommend termination of Allied's contract. However, we do recommend that no further options be exercised under Allied's contract (one option has already been exercised by the Navy).

We also find that the protester is entitled to recover its proposal preparation costs. See Nicolet Biomedical Instruments, 65 Comp. Gen. 145 (1985), 85-2 CPD ¶ 700. This is because UTE was unreasonably excluded from the competition by the Navy's failure to conduct discussions. For the same

reason, we also find UTE entitled to recover the costs of filing and pursuing the protest, including reasonable attorneys' fees. 4 C.F.R. § 21.6(d) (1988). UTE should submit its claim for such costs directly to the agency. 4 C.F.R. § 21.6(e).

The protest is sustained.

*for*   
Comptroller General  
of the United States